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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 876

RUTH COHEN, PERSONALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF BENJAMIN E. COHEN, DECEASED, JEAN COHEN, BETTY COHEN AND CHARLES JAMES COHEN,

Respondents,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

ANSWER AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DECISION BELOW.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, is reported at 140 Fed. (2d) 1.

QUESTIONS PRESENTED.

The petitioner in its original brief filed in the Circuit Court of Appeals raised the point that the contract signed by both parties provided that it should be deposited in

escrow with Hall & Ellis (agents of petitioner) to be held by them in escrow for the mutual benefit of both parties; that said contract had never been deposited with said Hall & Ellis; and that, therefore, the failure to so deposit said contract prevented said contract becoming in force between the parties.

The Circuit Court of Appeals in passing on this question said in its opinion (T. 251, 252):

> "By signing the instrument and returning it to the Chicago attorneys to be placed in escrow, defendant accepted plaintiff's proposal and assented to all its terms as expressed in the formal executed agreement. Thereby a binding agreement wherein the minds of the parties had fully met came into existence.
>
> True, the document was not taken to the escrow agent but such delivery was not a condition precedent to the binding effect of the executed agreement. It was merely specification of the means by which the contract was to be performed and was material only as it affected the rights and remedies of the parties arising subsequent to execution. The agreement itself provided that the document should be delivered to the escrow agent after it had been executed. The party who retained the executed contract was under obligation to deliver it to the escrow agent. Failure of the defendant to do so amounted to a breach to that extent for which it became liable to plaintiff."

The Circuit Court of Appeals thus passed upon the question presented to it for decision, and decided it in the language above set forth. Thereupon, the petitioner filed a petition for rehearing and in such petition stated that the decision of the Circuit Court of Appeals, amounted to a determination that the delivery of the signed contract by petitioner to its own attorneys could not be taken as a delivery of the contract to Cohen, because the signed con-

tract still remained in the control of petitioner through its own attorneys. That contention has now been carried by petitioner into the petition for certiorari here presented.

The above statement shows that the questions presented here are not

(a) whether the delivery by petitioner to its own attorneys of the alleged acceptance of the offer of Benjamin E. Cohen constituted a relinquishment by petitioner of possession and control thereof so as to amount to a delivery of such alleged acceptance by petitioner to said Benjamin E. Cohen (quoting from petitioner's brief);

because (1) the executed contract under its terms was to be delivered to Hall & Ellis, as escrowee, and (2) no question of delivery of the executed contract to Benjamin E. Cohen is involved herein because the executed contract under its terms was not to be delivered to Cohen;

(b) whether possession of a document by a party's own attorneys is to be considered the same as possession thereof by that party himself (quoting from petitioner's brief);

because (1) the contract was executed by Benjamin E. Cohen; contained the provision that said contract was to be delivered to Hall & Ellis; and petitioner executed the contract containing said provision and delivered same to his attorneys with instructions to deliver same to Hall & Ellis, and (2) petitioner's attorneys notified said Benjamin E. Cohen that they had received the executed contract from petitioner with instructions to deliver same to Hall & Ellis; and said attorneys stated to said Cohen that they were immediately delivering the executed contract to Hall & Ellis; and they confirmed this in a letter to Cohen which contained a copy of the executed contract;

(c) whether an offeree can be deemed to have accepted a written offer while the written offer is still in the posses-

sion of the offerees' own attorneys (quoting from petitioner's brief);

because (1) the real question is: where an executed agreement is placed in the hands of one of the parties to the contract under an agreement that the party holding same shall deliver the contract in escrow, can the party having possession of the contract by retaining possession of the contract and failing to keep his contractual liability to deliver same in escrow, be heard to claim his own breach of contract in failing to deliver the contract in escrow as a defense to a suit upon the contract.

REPLY TO REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Counsel for petitioner carry into their "Reasons Relied on", the same error that they make in the "Questions Involved Herein", as above set forth.